

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MANUEL GURROLA)	
Claimant)	
VS.)	
)	Docket No. 214,814
KANSAS CITY COLD STORAGE)	
Respondent)	
AND)	
)	
CONTINENTAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appealed the September 22, 1998, Award entered by Administrative Law Judge Robert H. Foerschler. On April 20, 1999, the Appeals Board heard oral argument in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Steven C. Effertz of Independence, Missouri. Respondent and its insurance carrier appeared by its attorney, D'Ambra M. Howard of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant suffered bilateral shoulder injuries as a result of a January 15, 1995, work-related accident. Based on a whole body permanent functional impairment rating, the Administrative Law Judge awarded claimant a 14 percent permanent partial general disability.

The respondent appealed and argues that the claimant proved a work-related left shoulder injury but did not prove a right shoulder injury. And, if it is found claimant did suffer a work-related right shoulder injury, his claim is barred because he failed to give respondent

timely notice of the injury. Accordingly, respondent contends claimant is limited to permanent partial disability benefits based on a scheduled injury found at K.S.A. 44-510d(a)(13).

Claimant alleges he proved he suffered bilateral shoulder injuries. Therefore, he requests the Appeals Board to affirm the Administrative Law Judge's permanent partial general disability award based on the 14 percent whole body function impairment rating. Claimant did not make a claim for work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Appeals Board finds that claimant failed to prove that, in addition to injuring his left shoulder on January 15, 1995, while employed by the respondent, he also injured his right shoulder. Therefore, for the reasons more fully developed below, claimant's award is limited to a scheduled left arm injury, including the shoulder.¹

Claimant alleges he suffered bilateral shoulder injuries while working for the respondent on January 15, 1995. Claimant testified he injured both shoulders as he was lifting a 300 pound block of ice onto a table in order to push the block into a ice crushing machine. The block of ice slipped and claimant felt pain in both shoulders. But claimant had more pain on the left than on the right. Claimant further testified that he notified his supervisor of the accident and told his supervisor that both arms hurt. Claimant was able to continue to work because the company moved to Missouri where he cleaned floors instead of lifting the heavy blocks of ice.

On claimant's January 15, 1995, date of accident, he was 22 years of age and had immigrated from Mexico at the age of 18. Claimant is a high school graduate and had taken about one month of instruction in the English language after he arrived in the United State. According to claimant, he has little capacity to either speak or understand the English language. Claimant was provided with interpreters when he testified both at a preliminary hearing and at the regular hearing held in this case. Additionally, claimant either had a family member or a friend with him to interpret for him during the majority of the medical treatment he received for his injuries. Claimant further testified that because of his language problem he did not receive or ask for medical treatment until he started working at the respondent's new location in Missouri. At that time, his union steward was bilingual, and he was able to communicate with the respondent. Through this communication, respondent referred claimant for medical treatment.

¹ See K.S.A. 44-510d(a)13 which provides that permanent partial disability for the loss of a arm, including the shoulder, is computed based on the maximum of 225 weeks.

Respondent first provided medical treatment for claimant's left shoulder complaints on April 5, 1995, through CompCare Clinic located in Kansas City, Missouri. The CompCare physicians treated claimant conservatively with anti-inflammatory medication and physical therapy. These physicians also placed claimant on light-work duty. On May 2, 1995, claimant underwent an MRI examination of his left shoulder which was abnormal. After that examination, on May 8, 1995, claimant was referred for further examination and evaluation to orthopedic surgeon Gregory L. Hummel, M.D.

Dr. Hummel saw claimant on May 23, 1995. After a physical examination and a review of the MRI examination, Dr. Hummel's impression was possible left shoulder supraspinatus impingement syndrome. The doctor injected claimant's left shoulder and continued claimant on anti-inflammatory medication. Because claimant did not improve, Dr. Hummel performed a left shoulder acromioplasty with distal clavicle resection and coracoacromial ligament resection on June 28, 1995.

Post-surgery, claimant was placed in a physical therapy program and home exercises were prescribed. Later, claimant also completed a therapy work hardening program.

After work hardening, Dr. Hummel did not feel that claimant was making the progress he should in an effort to return to work. Dr. Hummel felt that his subjective complaints did not correlate with many of his objective findings. Dr. Hummel questioned whether or not the claimant was motivated to return to work.

Finally, Dr. Hummel determined claimant had met maximum medical improvement on December 7, 1995. He released claimant with permanent restrictions of no lifting above the waist of more than 25 pounds; no lifting above shoulder level of more than 10 pounds; and advised claimant to limit the time he works in cold environments. In accordance with the AMA Guides, Dr. Hummel assessed claimant with a 15 percent permanent functional impairment of the left upper extremity at the shoulder level. He converted the 15 percent upper extremity rating to a 9 percent whole body rating.

During claimant's last examination with Dr. Hummel on December 7, 1995, claimant, for the first time, complained of bilateral shoulder achiness. At that time, because of the additional right shoulder complaints, Dr. Hummel performed a clinical examination of the right shoulder. He found no objective findings or deficits. Dr. Hummel testified that this was first time claimant had made right shoulder complaints to him. And, if claimant would have made right shoulder complaints before the December 7, 1995, examination, his medical records would have noted the complaints. The doctor also testified, if claimant had made right shoulder complaints before December 7, 1995, he would have performed a clinical examination of claimant's right shoulder as he preformed on December 7, 1995.

The doctor did not assess claimant with a permanent function impairment rating for his right shoulder complaints. Dr. Hummel opined that the AMA Guides required some objective findings of abnormal pathology before a functional impairment could be assessed.

He found that claimant only had subjective right shoulder complaints with no objective findings.

Two other orthopedic surgeons testified in this case. At the request of the respondent, Charles Craig Satterlee, M.D., evaluated claimant on March 3, 1997, and April 7, 1997. Charles Erik Nye, M.D., was appointed by the Administrative Law Judge to conduct an independent medical examination of only claimant's right shoulder. Dr. Nye saw claimant on one occasion on October 22, 1997.

In addition to taking a history from the claimant and performing a physical examination of the claimant on March 3, 1997, Dr. Satterlee had claimant undergo an MRI scan of the right shoulder. The results of the MRI scan were normal. Dr. Satterlee likewise found no objective evidence of an injury to claimant's right shoulder from his clinical examination. He assessed claimant with an 18 percent permanent functional impairment of the left upper extremity at the level of the shoulder. But he did not assess any permanent functional impairment to the right shoulder.

Claimant gave Dr. Nye a history of injuring both shoulders at work on January 15, 1995. The doctor found claimant to have subjective pain complaints in certain positions that he felt were consistent with an impingement of the right shoulder. But he found no swelling, redness, or any abnormal findings from either x-rays or the MRI examination. Based on the history that claimant had given and his subjective complaints, Dr. Nye assessed claimant with a 5 percent whole body functional impairment or an 8 to 9 percent right upper extremity functional impairment. Dr. Nye testified that he formulated the function impairment rating utilizing the AMA Guides, a guide from the American Academy of Orthopedic Surgery, and his years of experience. Based on the history that claimant provided him, Dr. Nye also related claimant's right shoulder injury to the January 15, 1995, work accident.

Claimant testified he told his supervisor after the January 15, 1995, accident that he injured both arms. He also testified he told the physicians that initially treated him at CompCare in April 1995 that he had, in addition to his left shoulder, also right shoulder complaints. Additionally, claimant testified he had made right shoulder complaints while undergoing physical therapy and during Dr. Hummel's treatment before the final examination on December 7, 1995.

The medical records of the CompCare Clinic and the records of Rehabilitation Center where claimant received physical therapy were offered by claimant and admitted without objection at the regular hearing. Those treatment records do not indicate that claimant made any complaints in regard to his right shoulder. The first notation in a medical record that claimant made right shoulder complaints is contained in Dr. Hummel's December 7, 1995, medical record.

The first claim that claimant filed for workers compensation benefits for the January 15, 1995, accident was a claim filed in Missouri dated August 31, 1995. The claim was for a January 15, 1995, left shoulder injury. Claimant then made a claim in Kansas by filing an Application for Hearing on August 13, 1996, that also claimed a January 15, 1995, left

shoulder injury. Claimant filed an amended Application for Hearing in Kansas on September 5, 1997, that claimed a January 15, 1995, accident and injuries to both his left and right upper extremities.

Claimant attempts to attribute the absence of right shoulder complaints in the medical records until December 7, 1995, to his lack of understanding of the English language. But the Appeals Board finds from a review of the medical records and the testimony of claimant's treating physician, Dr. Hummel, that the majority of the time that claimant received medical treatment he was accompanied by either a family member or a friend who acted as an interpreter. Accordingly, the Appeals Board does not find that claimant's limited understanding of the English language was the reason that the medical records do not contain right shoulder complaints until December 7, 1995.

The Appeals Board concludes that, if claimant does have pain and discomfort in his right shoulder, he has failed to prove the pain and discomfort is related to his January 15, 1995, accident. Although claimant understands little English, he had the benefit of interpreters when he received medical treatment for his left shoulder injury. The Appeals Board finds that it is difficult to believe claimant's testimony that he made right shoulder complaints to all of his medical treatment providers and none of those providers noted the right shoulder complaints until December 7, 1995. Also, the Appeals Board finds it is also significant that although claimant claims he injured both shoulders on January 15, 1995, he filed workers compensation claims on August 31, 1995, and August 13, 1996, only alleging a left shoulder injury.

Furthermore, the Appeals Board finds the greater weight of the medical evidence proves claimant has no permanent functional impairment to the right shoulder. The Appeals Board finds the most persuasive medical opinion concerning this question is that of claimant's treating physician, Dr. Hummel. Dr. Hummel opined that he did not find any objective evidence to substantiate claimant's subjective complaints and any injury that claimant suffered to his right shoulder did not result in any permanent impairment of function.

The Appeals Board, therefore, finds that claimant's award should be limited to a scheduled injury of the left upper extremity, including the shoulder. Claimant is entitled to a 15 percent permanent partial disability of the left upper extremity, including the shoulder based on Dr. Hummel's 15 percent functional impairment rating.

Because of the above finding, it is not necessary to address the issue of whether claimant gave timely notice to respondent of a right shoulder injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge Robert H. Foerschler's September 22, 1998, Award, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Manuel Gurrola and against the respondent, Kansas City Cold Storage, and its insurance carrier, Continental Insurance Company, for an accidental injury to claimant's left upper extremity, including the shoulder, which occurred on January 15, 1995, and based upon an average weekly wage of \$313.79.

Claimant is entitled to 27.29 weeks of temporary total disability compensation at the rate of \$209.20 per week or \$5,709.07, followed by 29.66 weeks of permanent partial disability compensation at the rate of \$209.20 per week or \$6,204.87 for a 15% permanent partial disability of the left upper extremity, including the shoulder, making a total award of \$11,913.94.

The total award of \$11,913.94 is presently due and owing claimant which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board approves and adopts all remaining orders as set forth in the Award that are not inconsistent with this order.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven C. Effertz, Independence, MO
D'Ambra Howard, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director